

DIVISION III

CACR06-1064

May 30, 2007

DANIEL PLUNKETT

APPELLANT

APPEAL FROM THE CIRCUIT COURT
OF POINSETT COUNTY
[NOS. CR-03-224; CR-03-232]

V.

HON. VICTOR LAMONT HILL,
JUDGE

STATE OF ARKANSAS

APPELLEE

AFFIRMED

The appellant pled guilty in 2004 to one count of possession of a controlled substance and one count of delivery of a controlled substance. Imposition of sentence was suspended for five years on one count, and five years' probation was ordered on the other count. The State subsequently filed a petition to revoke alleging that appellant violated the conditions of his suspension and probation by possessing a controlled substance with intent to deliver. After a hearing, the petition to revoke was granted, and appellant was sentenced to twenty years in the Arkansas Department of Correction. Appellant argues on appeal that the circuit court erred by allowing a crime laboratory report into evidence, by denying his motion to suppress, and by failing to dismiss the revocation petition as untimely.

With respect to the crime laboratory report, appellant contends that he was denied his right to confront a witness because the drug analyst who prepared the report was not made

available to testify. It is true that Ark. Code Ann. § 12-12-313(d)(2) (Repl. 2003) provides that presence of the analyst who prepared a crime lab report may be required if the defendant gives notice ten days prior to the proceeding that the presence of the analyst is requested. Here, the appellant asserted to the trial court that he had in fact filed a motion giving notice that the presence of the analyst at the revocation hearing was requested, and argues on appeal that the trial court's denial of this motion was error. However, we find no error. No motion requesting the analyst's presence at trial appears in the record before us. It is the appellant's burden to demonstrate error and, in the absence of such a motion, the right of confrontation under Ark. Code Ann. § 12-12-313 (Repl. 2003) is waived. *Robinson v. State*, 317 Ark. 512, 879 S.W.2d 419 (1994).

Appellant next argues that the trial court should have granted his motion, made at the close of all of the evidence, to suppress evidence on the grounds that the search had been illegal. However, a motion to suppress made at the close of the probation hearing is not timely and any error is waived. *Swanigan v. State*, 336 Ark. 285, 984 S.W.2d 799 (1999). This is in keeping with the rule that a party who does not object to the introduction of evidence at the first opportunity waives such an argument on appeal; the policy underlying this rule is that a trial court should be given an opportunity to correct any error early in the trial, perhaps before any prejudice occurs. *Id.*

Finally, appellant argues that the trial court erred by failing to dismiss the revocation petition because the hearing was not conducted within sixty days of his arrest as required by

Ark. Code Ann. § 5-4-310(b)(2) (Repl. 2006). However, by appellant's admission, he had been arrested beforehand on different charges that would not count toward the sixty-day limit, and appellant failed to show when he was released on the other charges or how much jail time was solely attributable to the revocation that is the subject of this appeal. The appellant has the burden of demonstrating error, and that burden is not met by showing the mere possibility of error. *Walker v. State*, 13 Ark. App. 124, 680 S.W.2d 915 (1984). We do not reverse unless the record demonstrates error. *Urich v. State*, 293 Ark. 246, 737 S.W.2d 155 (1987). Because the record in this case fails to do so, we affirm.

Affirmed.

BIRD and GRIFFEN, JJ., agree.